Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

ALEX GHEORGHIU,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Appeals Court erred in upholding the Trial Court's Denial of Safety Valve Consideration upon the findings made.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this matter is an unpublished opinion under the following caption: *United States v. Gheorghiu*, 2006 WL 1049377, and is contained in the appendix as A.1. The decision was issued 21 April 2006.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit, was rendered on 21 April 2006. This Petition is within 90 days thereof [Supreme Court Rule 13]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOKED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the rights to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The Petitioner was one of many charged Co-Defendants [eight] in a multiple year drug conspiracy. This was in the original but also in a Superseding Indictment that just named Gheorghiu.

On the morning of trial, and without a plea agreement, the Petitioner pled guilty to count one of a two count Second Superseding Indictment returned shortly before that time.

After the plea was entered, a presentence report was ordered, and such a report was received by counsel on or about 6 April, 2005.

The guideline calculations, due to the count plead to, set the base offense level at 30. However, due to the fact that only after the Petitioner pled [he was the last] did the Government learn that the drugs allegedly delivered were different than what was represented in the negotiations, the base offense level was reduced to level 26 in "fairness" considering the entire case.

Then, after factoring Petitioner's acceptance of responsibility, the PSR set the total offense level at 28, which was later, in conformance with the "intended" drug to be delivered, reduced to a level 24.

The Petitioner, through counsel, filed objections to the Presentence Report and also moved for a downward departure.

A sentencing hearing was had on 21 June 2005; the Court heard the objections as well as the Motion for Downward Departure. The Government called DEA Agent Mancuso and after his testimony, the Court reset the matter for imposition of sentence, which occurred on 11 July 2005.

The Court, at the 11 July hearing, rejected the Petitioner's objections to the presentence report, as to a role reduction based upon what was presented, and the Judge, as well, denied the "safety valve" consideration.

The Court similarly denied the Petitioner's Motion for Downward Departure, which also embraced the safety valve arguments, but did find that the Petitioner should be sentenced at a level "slightly lower than the advisory guideline range given the history and sentences already imposed in this case", and sentenced the Petitioner to 48 months, the bottom of the Petitioner's "found" guideline range being 51 months.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit on the two rulings by the trial Court, and each was affirmed. The issue presented in this Petition centers upon the affirmance of the denial of "safety valve" relief.

The Appellate Court's opinion is, in pertinent part, as follows:

> A defendant is entitled to safety-valve relief if he "meets [*inter alia,* the] criteria [that] not later than the time of the sentencing hearing, the defendant has truthfully provided the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct." *United States v. Simpson,* 228 F.3d 1294, 1304-1305 (11th Cir.2000) (citing 18 U.S.C. § 3553(f); U.S.S.G. § 5C1.2).
>
> Nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from safety-valve relief. We follow those circuits who have held that lies and omissions do not, as a matter of law, disqualify a defendant from safety-valve relief so long as the defendant makes a complete and truthful proffer not later than the commencement of the sentencing hearing.
>
> *Brownlee,* 204 F.3d at 1304-05. However, the district court, when deciding on the defendant's truthfulness, may take into account the defendant's previous untruthfulness, and the evidence of his lies becomes "part of the total mix of evidence for the district court to consider in evaluating the completeness and truthfulness of the defendant's proffer." *Id.* at 1305 (internal quotations and citation omitted).
>
> Here, Gheorghiu has failed to show that the district court clearly erred when it found that he was not entitled to the safety-valve reduction. The district court properly considered as part of the total mix, the fact that Gheorghiu was not truthfully forthcoming about his supplier and mailing controlled substances to himself. Because Gheorghiu has failed to show that the district court clearly erred in finding that he had not truthfully provided to the government all relevant information that he

had concerning the offense that was part of the same course of conduct, we affirm the district court's finding.

However, in actuality, the trial court himself questioned the agent and then the Court summed up the testimony by its own questioning:

> He eventually came around and told us about the meeting, but it was one of those things where he was not truthful with it and we just had to keep on asking him about it and basically, "Hey, we saw you do it," and I think he even had the surveillance reports that had indicated that, you know, we were aware of the meeting. And then he finally came out and told us about it.
>
> THE COURT: But eventually he answered the question truthfully?
>
> AGENT MANCUSO: Yes.
>
> THE COURT: All right. So then let me make sure I understand you.
>
> While you had to maybe—let me rephrase it. While he may not have been forthright from the very beginning, did he eventually answer all of your questions?
>
> AGENT MANCUSO: Yes.
>
> THE COURT: And in your opinion the answers that he gave you, regardless of whether they were five minutes into the interview or five hours into the interview, the answers that he eventually gave you, were those answers truthful?
>
> AGENT MANCUSO: Yes. As far as we knew from our investigation, yes.
>
> THE COURT: The answers were truthful. Okay.
>
> All right.

At sentencing, three weeks later, however the Court denied the safety valve, the Court found:

> With respect to the safety valve issue, the Court will deny Mr. Gheorghiu's request that he be eligible for a safety valve.
>
> The Court finds by a preponderance of the testimony and evidence presented to the court that Mr. Gheorghiu has not truthfully provided to the government all information and evidence that Mr. Gheorghiu has or had concerning the offense that was part of the same course of conduct or of a common scheme or plan.

The trial Court then denied the safety valve application, and was upheld by the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

I. THE APPEALS COURT ERRED IN UPHOLDING THE TRIAL COURT'S DENIAL OF SAFETY VALVE CONSIDERATION UPON THE FINDINGS MADE

Petitioner submits that the trial Court's questioning of and the answers given by the agent to the District Judge as set out above illustrate the clear error of the Appellate Court holding.

Appellant would submit, therefore, that the decision of the Eleventh Circuit conflicts with the decisions of the Courts in *United States v. Schreiber*, 191 F.3d 103 (2 Cir. 1999), *United States v. Ramunno*, 133 F.3d 476 (7 Cir. 1998), *United States v. Tournier*, 171 F.3d 465 (8 Cir. 1999) as well as *United States v. Gama-Bastidas*, 142 F.3d 1233 (10 Cir. 1998) and *United States v. Jeffers*, 329 F.3d 94 (2 Cir. 2003).

Petitioner met all of the qualifications for "safety valve" consideration. His initial reticence was later corrected, and thus was established by the trial Court.

The Appellate Court decision was thus clearly erroneous and contrary to the decisions of the other Circuits.

CONCLUSION

For all of the foregoing, a writ of certiorari ought issue to the United States Court of Appeals for the Eleventh Circuit to review the decision at issue and enter whatever other orders are appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 05-14100
Non-Argument Calendar
D.C. Docket No. 03-60[illegible]75-CR-WJZ

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALEX GHEORGHIU,
Defendant-Appellant.

April 21, 2006

Before DUBINA, MARCUS and WILSON, *Circuit Judges.*

PER CURIAM:

Appellant Alex Gheorghiu appeals his 48-month sentence for conspiracy to possess with intent to distribute methylenedioxymethamphetamine hydrochloride ("MDMA"), in violation of 21 U.S.C. § 846. On appeal, Gheorghiu first argues that he should have received a minor-role reduction because his only conduct in a lengthy conspiracy was a one-day appearance.

We review a district court's decision on whether to grant a minor-role reduction for clear error. *United States v. De Varon*, 175 F.3d 930, 937 (11th Cir.1999) (en banc).

> Minimal participants may receive a four-level reduction, [and] minor participants may receive a two-level reduc-

> tion . . . *See* U.S.S.G. § 3B1.2(a), (b). The commentary to the Guidelines instructs that a four-level reduction "is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group . . . and their lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as mini mal participant." U.S.S.G. § 3B1.1, comment. (n.1). The application note provides, for example, that a four-level reduction would be appropriate "for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." U.S.S.G. § 3B1.2, comment. (n.2). In contrast, a minor role in the offense "means any participant who is less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2, comment. (n.3).

Id. at 939.

The defendant has the burden of establishing his role by a preponderance of evidence. *Id.* For a sentencing court to determine whether to grant a minor-role reduction, it considers two principles. *Id.* at 940. First, the court must measure the defendant's role against the relevant conduct for which she is being held accountable. *Id.* We have noted that "[o]nly if the defendant can establish that she played a relatively minor-role in the conduct for which she has already been held accountable-not a minor role in any larger criminal conspiracy-should the district court grant" a minor-role reduction. *Id.* at 944. The second prong of the minor-role reduction analysis permits a district court, "where the record evidence is sufficient . . . [, to] measure the defendant's conduct against that of other participants in the criminal scheme attributed to the defendant." *Id.* at 934.

Because the record demonstrates that Gheorghiu was held accountable only for his own conduct in supplying the MDMA, we conclude from the record that the district court did not err in failing to grant a minor-role reduction. As to this issue, we affirm the district court.

Gheorghiu next argues that, because he eventually told the government the truth regarding the instant offense, he was entitled to safety-valve relief. The standard of review of a district court's factual determinations of whether to grant safety-valve relief is clear error. *United States v. Cruz*, 106 F.3d 1553, 1557 (11th Cir.1997). "The question of whether the information [that the defendant] supplied to the government . . . was truthful and complete . . . is a factual finding for the district court." *United States v. Brownlee*, 204 F.3d 1302, 1305 (11th Cir.2000). "The burden of proof on the truthfulness issue lies, of course, with the defendant." *United States v. Espinosa*, 172 F.3d 795, 797 (11th Cir.1999). The district court's findings of credibility are accorded special deference. *United States v. Amedeo*, 370 F.3d 1305, 1318 (11th Cir.2004).

A defendant is entitled to safety-valve relief if he "meets [*inter alia,* the] criteria [that] not later than the time of the sentencing hearing, the defendant has truthfully provided the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct." *United States v. Simpson*, 228 F.3d 1294, 1304-1305 (11th Cir.2000) (citing 18 U.S.C. § 3553(f); U.S.S.G. § 5C1.2).

Nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from safety-valve relief. . . . We follow those circuits who have held that lies and omissions do not, as a matter of law, disqualify a defendant from safety-valve relief so long as the defendant makes a complete and

truthful proffer not later than the commencement of the sentencing hearing.

Brownlee, 204 F.3d at 1304-05. However, the district court, when deciding on the defendant's truthfulness, may take into account the defendant's previous untruthfulness, and the evidence of his lies becomes "part of the total mix of evidence for the district court to consider in evaluating the completeness and truthfulness of the defendant's proffer." *Id.* at 1305 (internal quotations and citation omitted).

Here, Gheorghiu has failed to show that the district court clearly erred when it found that he was not entitled to the safety-valve reduction. The district court properly considered as part of the total mix, the fact that Gheorghiu was not truthfully forthcoming about his supplier and mailing controlled substances to himself. Because Gheorghiu has failed to show that the district court clearly erred in finding that he had not truthfully provided to the government all relevant information that he had concerning the offense that was part of the same course of conduct, we affirm the district court's finding.

For the above-stated reasons, we affirm Gheorghiu's sentence.

AFFIRMED.